



February 3, 2006

TO: Coastal Conservancy

FROM: Steve Horn
Deputy Executive Officer

**SUBJECT: Executive Officer's Report:
Conservancy Easement Standards and Practices**

At the December 2005 meeting the Conservancy requested a discussion of the contents of conservation easements employed by and/or funded by the Conservancy pursuant to Board authorizations. This memo is intended to initiate that discussion by providing information on current Conservancy practices.

In general, the Conservancy staff believes that the grant agreement and conservation easement forms that we currently employ provide a high degree of assurance that the State will be able to enforce the terms of its agreements with easement-holders and landowners. The specific terms of conservation easements may vary with each property, but all of these easements will have some basic components as described below.

Purposes of Conservation Easements and Grant Agreements

The discussion should involve both conservation easements and Conservancy grant agreements because these documents function together where a project is being carried out by another organization using Conservancy funds.

Through its grant agreements and through conservation easements funded by those grants, the Conservancy assures that the projects that it authorizes will comply with the requirements of Division 21 of the Public Resources Code and with other State and federal statutes, administrative guidelines and procedures. The Conservancy has developed the form and content of its grant agreements

over its thirty-year history, modifying the “standard” form of these documents many times in response to new laws, changing procedures of other agencies, and the lessons of experience. Conservation easements have been produced by the Conservancy itself for dozens of direct acquisitions, and Conservancy staff members have reviewed and critiqued the easements proposed by many other agencies.

These are enforceable legal instruments intended to protect the public interest and to achieve specific public purposes. Much of the content of the grant agreements is directed at minimizing risks to the State’s interests through provisions including controls over the disbursement of funds, express limitations on tort liabilities, control over assignments or delegations of responsibility to third parties, rights of project inspection, financial auditing and early termination of the grant agreement. Much of the content of conservation easements describes the purposes intended to be achieved and the ways in which the landowner and the easement-holder will act in accord with those purposes. The property-interest rights and obligations of the landowner and the easement-holder, together with the contractual rights and obligations of the (grantee) easement-holder and the Conservancy, assure the public that the conservation protection that has been purchased will have a reasonable likelihood of permanence.

Basic Conservation Easement Components

Conservation easements used or approved by the Conservancy include the following four components:

1. Statement of Conservation Purposes: what are the conservation values to be protected, and what would be the public significance of protecting them?
2. Description of Specific Restrictions and Rights: what rights are being purchased by the easement-holder, and what rights are being retained by the landowner?
3. Compliance Monitoring: what are the rights and responsibilities of the landowner and the easement-holder in administering compliance with the purposes and specific restrictions of the easement?
4. Enforcement: what are the procedures to remedy conditions of noncompliance?

The complete easement document also includes a variety of clauses that describe

in detail the mechanics of making the easement work, including provisions for: the amendment, extinguishment or transfer of the easement; the interaction between the easement and other existing or future property interests; the formal notification procedures between the parties; the mutual understandings with respect to relevant provisions of law; and so forth. Depending upon the purpose of the easement, there may be detailed requirements concerning continuing economic activity by the landowner, such as management plans for logging or intensive agriculture.

Given these basic components, however, each conservation easement will be “unique” - - it must be tailored to the physical/administrative conditions of a specific site and to the specific purposes of the public for that site, and it must be negotiated to agreement with a landowner.

Working with Conservation Partners

The conservation easement projects funded by the Conservancy usually involve partnerships with local governments, other State agencies and/or nonprofit land trusts. Most of these organizations have experience with conservation easements and preferred ways of drafting these documents. While there is generally agreement concerning the necessary contents of conservation easements (as outlined above), the “standard” legal phrasing often varies from organization to organization. Each easement is also site-specific and consequently somewhat unique. To create a satisfactory product, in every easement project the Conservancy legal staff works to merge our forms of agreement with those of our partners. This process takes some time but it is probably not avoidable if we are to get the benefits of these voluntary conservation partnerships. It is also by this iterative process that we are able to draw upon the experiences of other agencies and thus improve our own standards.

Some of the influences that come from our conservation partners:

1. A nonprofit land trust is frequently the holder of a conservation easement and consequently the party responsible for ongoing interaction with the landowner. It follows that in creating the easement document, nonprofits are often concerned with those parts of the easement that detail the rights and responsibilities of the underlying private landowner and that specify the kinds of active oversight that will be expected of the easement-holder.

2. Other State agencies are often, like the Conservancy, in the role of funding the acquisition of easement rights by third parties - - nonprofits or local government agencies. They are concerned with clarifying the enforcement mechanisms that will protect the State's investment, and with specifying the role of State employees in monitoring compliance with the easement terms.

Conservancy Grants for Acquisition of Conservation Easements

The Conservancy is authorized to provide grants to public agencies and nonprofit organization for the acquisition of interests in land, including conservation easements. Under provisions of Division 21 of the Public Resources Code and appropriations of funds to the Conservancy in annual budget acts, the Conservancy is charged to specify essential terms and conditions of a grant and to provide for a "reversionary" interest in the State if any of these essential terms and conditions are violated. For example, Public Resources Code Section 31116 (b) requires, in the case of a grant to a nonprofit organization for land acquisition, that the purchase price not exceed fair market value of the interest acquired; that the Conservancy approve the terms and conditions under which the interest is acquired; that the interest may not be transferred or used as security for a debt without Conservancy approval; and that upon violation of any essential term or condition, title to all interest acquired with state funds immediately vest in the State. Conservancy staff ensures that all essential terms and conditions of a land-acquisition grant are specified in the grant agreement and in recorded documents that provide for this vesting in the event of a violation. In the case of conservation easements, this language is typically included within the body of the easement document. The Conservancy's right to take title to the easement, or to designate another public agency or nonprofit organization to do so, can be exercised upon violation of any of the essential terms and conditions specified in section 31116(b) or upon violation of a material provision of the conservation easement, in the event the easement-holder fails to enforce or correct the violation itself.

Continuing Improvement

The Conservancy staff is active in efforts to improve the effectiveness of conservation easements and grant agreements. Our nonprofit and public agency partners are also trying to do so.

Nonprofit land trusts have joined together to develop appropriate standards for creating and managing conservation easements. In 2004, following several years

of committee work, the national group that represents more than 1,500 land trusts, the Land Trust Alliance (LTA) based in Washington, D.C., promulgated its “Standards and Practices” guidelines. In part, those guidelines articulate how conservation easement transactions should be structured and how the nonprofit easement-holder should conduct its oversight. The principal purposes of these standards is are to enable the nonprofits to assure landowners, donors and the Internal Revenue Service that the charitable purposes of the conservation easements will be achieved, and to assure themselves that courts will enforce these permanent restrictions. The LTA conducts many training courses for nonprofits in order to facilitate these “best practices”. The standards recommended by the LTA for conservation easements and easement-holding nonprofits include many of same requisites that characterize Conservancy transactions: clear statements of conservation purposes; “baseline” studies that document the conservation values; easement stewardship plans that include regular monitoring; clarification of the responsibilities and reserved rights of the underlying landowners; and specific enforcement procedures. The LTA has recently called for all land trusts to verify their intention and ability to conduct transactions according to these standards through a process of peer-review and accreditation.

State agencies have worked individually and together to improve our “forms” for both grants and easements, in response to the requirements of specific projects and in response to external pressures. As the number of these conservation projects has increased following public approval of bond acts in 2000 and 2002, this greater public profile has resulted in greater attention and scrutiny from the press, the legislature, academic institutions, conservation organizations, and the public. The greater number of these projects, and the larger number of multi-agency projects, has provided more opportunities for discussion among the legal and project staff members of the several conservancies, the Wildlife Conservation Board, Department of Conservation, State Parks, etc.. The Conservancy staff is in on-going discussion with our colleagues concerning these matters.

There is not now any bill introduced or administrative mandate proposed that would require changes in Conservancy grant agreement and or the conservation easements that are funded by them. Our will report back to Board concerning any proposed changes that would be substantial shift from existing practice.